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No. 82-167

In the Supreme Court of the United States

OCTOBER TERM, 1982

COMMANDER GEORGE C. CHAPPELL, ET AL., PETITIONERS

v.

VERNON WALLACE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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Respondents, like the court of appeals, begin from the premise that the issue in this case is whether a court may "review" a military decision. See Br. in Opp. 3; Pet. App. 4a, 16a n.9. Like the court below, respondents accordingly cite an array of cases dealing with military decisions (see Br. in Opp. 3-6; Pet. App. 5a). All but two of respondents' cases, however, involve some form of specific relief — a declaratory judgment, an injunction, or the setting aside of a military action — and not damages.

This case, by contrast, is a suit for damages, brought by servicemen against their superior officers in their personal capacities. The question presented is whether such suits, based on a cause of action implied directly under the Constitution, should be allowed. As we explained in the petition, it is obvious that the possibility of a suit for personal damages is more likely than a possible suit for some other

form of relief to cause officers to hesitate before ordering actions they believe necessary, and a serviceman's ability to threaten a personal damages action is, similarly, far more likely to undermine military discipline and the military chain of command. "It is almost axiomatic that the threat of damages has a deterrent effect * * * surely particularly so when the individual official faces personal financial liability." *Carlson* v. *Green*, 446 U.S. 14, 21 (1980) (footnote omitted).

The only two cases cited by respondents in which suits for damages were allowed to be brought against military officials are *Alvarez* v. *Wilson*, 431 F. Supp. 136 (N.D. Ill. 1977), and *Wilkes* v. *Dinsman*, 48 U.S. (7 How.) 89 (1849), on writ of error after a new trial, 53 U.S. (12 How.) 389 (1851). As we noted in the petition (Pet. 15), the defendants in *Alvarez* have appealed the district court's decision to the Seventh Circuit. No. 81-2696. In *Wilkes*, the plaintiff alleged a common law tort (see 48 U.S. (7 How.) at 89, 121), not a constitutional violation. The question whether a damages remedy should be created directly under the Constitution was, therefore, not presented in that case. In addition, the plaintiff in *Wilkes* alleged that he was no longer a member of the armed forces when his commanding officer wronged him (see *id.* at 121; 53 U.S. (12 How.) at 402). Such an allegation, in certain circumstances, may permit civilian courts to intervene in military affairs to a greater degree. Compare *Schlesinger* v. *Councilman*, 420 U.S. 738, 759 (1975), with *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11 (1955); compare *Feres* v. *United States*, 340 U.S. 135 (1950), with *United States* v. *Brown*, 348 U.S. 110 (1954).

Consequently, the court below remains the only appellate court to have held that servicemen may invoke an implied constitutional cause of action to threaten their superior officers with personal damages liability. Indeed, two cases decided subsequent to the filing of our certiorari petition emphasize the aberrant nature of the ruling below. See *Lombard* v. *United States,* No. 81-2261 (D.C. Cir. Sept. 14, 1982), slip op. 24-26; slip op. 1 (Ginsburg, J., concurring in part and dissenting in part); see also *Scales* v. *United States,* 685 F.2d 970, 973 (5th Cir. 1982).

For these reasons and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

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